IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-574

IN THE MATTER OF
JOHN JOSEPH MURRAY

Appellant

ON APPEAL FROM THE
SUPREME COURT OF INDIANA

JURISDICTIONAL STATEMENT

SAUL I. RUMAN
5261 Hohman Avenue
Hammond, Indiana 46320
(219) 933-7600

Attorney for Appellant

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	i
LOWER COURT ACTION	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTION PRESENTED	3
STATEMENT OF THE CASE	3
PROCEEDINGS BEFORE THE HEARING OFFICER	5
HOW THE FEDERAL QUESTIONS WERE RAISED OR DECIDED BELOW .	8
THE FEDERAL QUESTIONS ARE SUBSTANTIAL	13
I. RULE 23, §14(a) DENIED APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION BY PROVIDING ATTORNEYS WITH SUBSTANTIALLY LESS PROCEDURAL PROTECTION THAN AFFORDED OTHERS IN BOTH CIVIL AND CRIMINAL LITIGATION .	14
II. RULE 23, §14(a) DENIED APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY FAILING TO PERMIT ATTORNEYS CHARGED WITH MISCONDUCT THE DISCOVERY PROCEDURES NECESSARY TO INSURE FUNDAMENTAL FAIRNESS	21
CONCLUSION	24

APPENDIX

STATE SUPREME COURT OPINION . . . A1

DENIAL OF PETITION FOR REHEARING . A15

NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT . . . A16

TABLE OF AUTHORITIES

PAGE

CASES:

Baxstrom v. Herold, 383 U.S. 107 (1966) 17

Cafeteria and Restaurant Workers Union, etc. v. McElroy, 367 U.S. 886 (1961) 21

Carroll v. State, ___ Ind. ___, 338 N.E.2d 264 (1975) 15

Goldberg v. Kelly, 397 U.S. 254 (1970) 22

Gulf, Colorado and Santa Fe Ry. v. Ellis, 165 U.S. 150, 155, 159 (1897) 17

In re Ruffalo, 390 U.S. 544, 20 L.Ed. 117, 88 S. Ct. 1222, reh. den. 391 U.S. 961, 20 L.Ed. 874, 83 S. Ct. 1833 . . . . . 12, 16

In re Stivers (1973) 260 Ind. 120, 292 N.E.2d 804 12

Lathrop v. Donohue, 367 U.S. 820 (1961) 2, 14

Mueller v. Mueller (1972) 259 Ind. 366, 287 N.E.2d 886 11

Murphy v. State, ___ Ind. ___, 352 N.E.2d 479 (1976) 15

Neill v. Ridner (1972) 153 Ind. App. 149, 286 N.E.2d 427 11

Skinner v. Oklahoma, 316 U.S. 536 (1942) 17

Sniadach v. Family Finance Corp. 395 U.S. 337 (1969) 22

State ex rel Keller v. Criminal Court, ___ Ind. ___, 317 N.E.2d 433 (1974) 15

State ex rel. Red Dragon Diner v. Superior Court of Marion County, etc., et al (1959) 239 Ind. 384, 158 N.E.2d 164 11

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment XIV 7, 8, 11

STATUTES:

28 U.S.C. §1257(2) 1, 2, 13, 14

28 U.S.C. §2103 2

Indiana Trial Rule 30 15

Indiana Trial Rule 31 15

Indiana Rules of Criminal Procedure 21 15

Burns Ind. Stat. Annot., Court Rules Book 2, p. 667 (1973) . . . 3

Indiana Rules for Admission to the Bar and the Discipline of Attorneys:

Rule 23, §1(a) 13

Rule 23, §1(d) 13

Rule 23, §14(a) 2, 3, 11, 14, 21

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. _____

IN THE MATTER OF
JOHN JOSEPH MURRAY

Appellant

ON APPEAL FROM THE
SUPREME COURT OF INDIANA

JURISDICTIONAL STATEMENT

SAUL I. RUMAN
5261 Hohman Avenue
Hammond, Indiana 46320
(219) 933-7600

Attorney for Appellant

A

(LOWER COURT ACTION)

The unofficial report of this appeal from the Indiana Supreme Court appears at 362 N.E.2d 128. Final action on the case came on July 19, 1977 wherein appellant's petition for rehearing was denied.

B

(JURISDICTION)

The proceeding appealed from was an original action in the Indiana Supreme Court pursuant to the Indiana Rules for Admission to the Bar and the Discipline of Attorneys. Appellant was disbarred from the practice of law. Appeal is brought to the United States Supreme Court pursuant to 28 U.S.C. §1257(2).

Under Indiana Appellate Procedure, final action was taken by the Indiana Supreme Court (the court of original jurisdiction) on July 19, 1977, when appellant's Petition for Rehearing was denied. The original opinion of the court was delivered April 26, 1977. Notice of Appeal was filed on October 7, 1977, in the Indiana Supreme Court.

Jurisdiction is conferred on this court pursuant to 28 U.S.C. §1257(2). See Lathrop v. Donohue, 367 U.S. 820 (1961).

In the event that the Court does not consider appeal to be the proper mode of review, appellant requests that the papers upon which this appeal is taken be regarded and acted upon as a petition for writ of certiorari pursuant to 28 U.S.C. §2103.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal questions the validity of Rule 23, §14(a) of Indiana Rules for Admission to the Bar and the Discipline of Attorneys (hereinafter referred to as Indiana Admission and Discipline Rules) which provides as follows:

> (a) The rules of pleading and practice in civil cases shall not apply. No dilatory motions shall be entertained. The case shall be heard on the complaint and an answer which may be filed by the respondent within thirty [30] days after notice of the filing of the

complaint. An answer, if filed, may assert any legal defense. If the respondent shall elect to file an answer, he shall file six [6] copies with this Court. An answer need not be filed, in which case the complaint shall be taken as denied. A respondent may on a showing of good cause petition for a change of hearing officer within ten [10] days after the appointment of such hearing officer. Burns Ind. Stat. Annot., Court Rules Book 2, p. 667 (1973).

QUESTION PRESENTED

Whether Rule 23, §14(a) of the Indiana Admission and Discipline Rules, which prohibits an attorney from utilizing discovery procedures (interrogatories, requests for production of documents, and depositions) in the preparation of his defense in a disbarment action violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment?

STATEMENT

Prior to the incident which gave rise

to the disbarment proceedings, appellant had been a practicing attorney for twenty (20) years. For six (6) of those years, appellant had been judge of the Starke County Circuit Court. Appellant was a graduate of Notre Dame Law School and had won the Bronze Star while serving with the United States Army during World War II.

The disbarment proceedings arise from appellant's representation of Jerry Laine who was convicted of receiving stolen goods. The disbarment proceedings began after the conviction of Jerry Laine when Laine and members of his family signed affidavits charging unethical conduct on the part of appellant. Essentially, the formal complaint against appellant charged him with knowingly using false testimony in preparing an alibi defense, inducing witnesses to sign false affidavits, and exerting improper influence over various witnesses. All the allegations of unethical conduct revolved around appellant's defense of Jerry Laine.

PROCEEDINGS BEFORE THE HEARING OFFICER

In Indiana, an action to disbar an attorney is an original action in the Indiana Supreme Court. Each case is prosecuted by the Disciplinary Commission which is an independent commission established to investigate and prosecute charges of misconduct on the part of attorneys. The Indiana Supreme Court may name a hearing officer to hear the evidence. In this case a retired judge was named as hearing officer. The Indiana Supreme Court is not bound by the factual findings made by the hearing officer; in fact, the members of the Indiana Supreme Court make an independent review of the testimony. As noted by the court in this case, "[T]here is no standard of review as applied within appellate procedure, but merely the application of a process of determination whereby this court finds facts as required in all original actions."

The hearing took place in early July of 1975. The evidence before the hearing

officer was contradictory with regard to every charge of misconduct. The evidence which supported the charge of misconduct came almost exclusively from Jerry Laine, the former client of the appellant, and members of his family. All the members of the Laine family admitted hostility toward the appellant because Jerry Laine had been convicted. All the members of the Laine family were perjurers by their own admission. The testimony of the Laine family was replete with internal contradictions, and was further contradicted on virtually all material facts by many independent witnesses.

After many months, the hearing officer adopted the findings of fact submitted by the Disciplinary Commission, the body which prosecutes the disbarment proceedings. The findings of fact by the hearing officer included misconduct by the appellant.

The sole issue before this court is the refusal of the Indiana Supreme Court to permit discovery by the appellant in preparation of his defense.

On April 15, 1975, well before the hearing, interrogatories were filed re-

questing the Disciplinary Commission to supply, inter alia, the names of witnesses and information regarding the witnesses. Similarly, on April 24, 1975, the appellant served deposition subpoenas upon witnesses then known to him. The Disciplinary Commission objected to all forms of discovery by motion. At a pre-trial hearing on May 16, 1975, the hearing officer heard argument on the issue of discovery. Counsel for the appellant argued, inter alia, that a denial of discovery violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The hearing officer found as follows with regard to the taking of depositions:

> "The Court's conclusion and the hearing officer's conclusion is that under Rule 23, jurisdiction does not authorize the taking of these depositions and this discovery and the ruling will be made accordingly."

With regard to the other forms of discovery attempted by the appellant the following exchange occurred:

> MR. RUMAN [Defense Counsel]: "Then it will be on the motion to produce, the interrogatories

> and the notice for depositions all will be denied?"
>
> HEARING OFFICER: "Right."

HOW THE FEDERAL QUESTIONS WERE RAISED OR DECIDED BELOW

At the pre-trial hearing of May 16, 1975, appellant raised the argument that denial of discovery violated the Fourteenth Amendment.

> MR. RUMAN: "The Court said these rules [Ind. Rules of Civil Procedure] do not apply to this [disbarment] action, but I still think the concepts of justice and due process that they talk about apply. . . . they can say that their rules [Ind. Rules of Civil Procedure] do not apply, they cannot say the Constitution providing that we are entitled to due process and equal protection doesn't apply."

Appellant's argument before the hearing officer was twofold. The equal protection aspect of his argument focused upon the uniqueness of Indiana procedure which provides liberal discovery in both civil and criminal proceedings. To allow full discovery in civil cases and criminal

cases without regard to the size of the claim or magnitude of the offenses, but deny discovery to an attorney whose livelihood is at stake is a denial of equal protection under the laws.

> MR. RUMAN: "Again, a lawyer is charged in a disbarment proceeding has always been very disturbing to me. In a situation where the consequences to the lawyer are in most instances greater than most civil suits I am in, consequences where you have the right to protect your client by full discovery. It is greater to the lawyer in terms of even most criminal cases I have been in. There is no other occupation that for doing an act, assuming that we are found guilty of an act, that isn't even criminal where a man's prohibited from engaging in his livelihood."

* * *

"How much less right should a lawyer have to protect himself in his livelihood, in his family, what we do for a living to earn for our family than the criminal. Are we worse off then they? Should we be worse off than they? Should we be less well off than the criminal? Should we be less well off than a man who has cheated someone out of $500 and is being sued in

fraud?"

* * *

"I submit that due process today as it is being developed at the federal level, and in the states, demand that a lawyer have full discovery to learn the evidence not available for trickery, it is to find out the evidence against you. It is asking no more than he would have in a civil case if he were sued with a lot more to lose than at jeopardy in this disbarment proceeding to say that due process justice for him requires the ability to say I need the same kind of a right that we would have in a civil case. The right to take depositions so that we know that witnesses are saying against us. The right to have admissions made, if that be or interrogatories answered, if that be applicable." [Appellant's counsel during May 16, 1975 pre-trial hearing on issue of discovery.]

The constitutional issue surrounding the denial of discovery was raised before the Indiana Supreme Court as it exercised its original jurisdiction over the case. On April 26, 1977, in response to appellant's contentions, the Indiana Supreme

Court stated:

> At the time this matter was presented for consideration to the Hearing Officer, Admission and Discipline Rule 23, Section 14(a) provided that the rules of pleading and practice in civil cases shall not apply and disciplinary proceedings shall be heard on the complaint and answer. No provision of the rule authorized discovery.
>
> The respondent's argument appears to be the assertion of a denial of procedural due process. While the parameters of such right remain undefined, it has been generally held that the rights of procedural due process, as applied to the states by the 14th Amendment of the Constitution of the United States, and as applied in this state under Article 1, Section 12, of the Constitution of Indiana, includes notice and an opportunity to be heard. Mueller v. Mueller (1972), 259 Ind. 366, 287 N.E.2d 886; State ex rel. Red Dragon Diner v. Superior Court of Marion County, etc., et al. (1959) 239 Ind. 384, 158 N.E.2d 164; Neill v. Ridner (1972), 153 Ind. App. 149, 286 N.E.2d 427.
>
> This due process standard has been applied to proceedings involving the suspension or revocation of the license to practice law, and it has been generally held that such proceedings must provide the respondent attorney with notice of the charges and an opportunity to be heard. In re Ruffalo, 390 U.S. 544, 20 L.Ed. 117, 88 S. Ct. 1222, reh. den. 391 U.S. 961, 20 L. Ed. 874, 83 S. Ct. 1833; In re Stivers, (1973) 260 Ind. 120, 292 N.E.2d 804. (A. 2-3)

In conclusion, the Court stated:

> Accordingly, this Court concludes that the failure to grant discovery prior to the trial on the merits of this cause did not constitute an abridgment of the respondent's right to due process of law. (A. 3)

The Indiana Supreme Court did not treat the equal protection argument separately from the due process argument. Rather, the Court apparently grouped the two issues together under the term "procedural due process."

A timely petition for rehearing was denied by the Indiana Supreme Court on July 19, 1977.

C

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

JURISDICTION

Throughout the disbarment proceeding, first the hearing officer and then the Indiana Supreme Court construed Rule 23, §1(a) to prohibit the use of discovery procedures (depositions, interrogatories and requests for production) in a disbarment procedure. The hearing officer specifically stated that Rule 23 §1(d) "does not authorize the taking of these depositions and this discovery and the ruling will be made accordingly." Thus, appellant's contention that the denial of discovery was unconstitutional directly challenges the validity of Rule 23, §1(a) of the Indiana Admission and Discipline Rules.

The primary jurisdictional issue before the court is whether a rule regarding the admission and discipline of attorneys promulgated by the Indiana Supreme Court is a "statute" within the meaning of 28 U.S.C. §1257(2). That

question was answered in Lathrop v. Donohue 367 U.S. 820 (1961). In Lathrop an attorney challenged a "Rule and By-law of the State Bar of Wisconsin" which "integrated" the state bar. Although the "Rule and By-law" of Wisconsin was upheld as constitutional, the court specifically held that such a "rule" would be a statute within the meaning of 28 U.S.C. §1257(2).

I.

RULE 23, §14(a) DENIED APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION BY PROVIDING ATTORNEYS WITH SUBSTANTIALLY LESS PROCEDURAL PROTECTION THAN AFFORDED OTHERS IN BOTH CIVIL AND CRIMINAL LITIGATION

The Indiana Supreme Court adopted the Federal Rules of Civil Procedure, with minimal exceptions, as the rules of procedure governing civil cases throughout the state. Thus, for several years, pretrial discovery has been controlled by Rules 26 through 37 which are virtually identical to the corresponding Federal Rules of Civil Procedure. A civil litigant has the option of using various means

of discovery such as interrogatories, requests for production of documents, and depositions. This right in civil cases exists without regard to the magnitude of the civil claim. A civil litigant has the full arsenal of discovery methods available even if the claim is for a $10.00 overpayment on an account.

Similarly, discovery for a criminal defendant in Indiana is extremely broad. Beginning with State ex rel Keller v. Criminal Court ___ Ind. ___, 317 N.E.2d 433 (1974), reciprocal discovery in criminal cases has become the rule in Indiana. Subsequent cases have made it clear that discovery in criminal cases is a right. Murphy v. State, ___ Ind. ___, 352 N.E.2d 479 (1976); Carroll v. State, ___ Ind. ___, 338 N.E.2d 264 (1975). In fact, the rules of civil procedure regarding discovery have been incorporated as the rules of discovery in criminal cases. Thus, in Murphy v. State, supra, the Indiana Supreme Court stated:

> Trial Rule 30 and 31 provide for the taking of depositions in civil cases and these rules apply to criminal cases through Indiana Rules of

Criminal Procedure 21. (supra at 482)

Apparently, all forms of civil discovery are available in criminal prosecutions regardless of the nature of the offense charged.

No one can underestimate the importance and magnitude of a disbarment proceeding. Disbarment proceedings are such that an attorney who has spent his entire life practicing law may be barred from pursuing his livelihood upon the showing of one transgression. There is a finality associated with the disbarment of an attorney which distinguishes it from even a civil suit. Recognizing the magnitude of disbarment proceedings this court has concluded that such adversary proceedings are "quasi criminal in nature." In re Ruffalo, 390 U.S. 544.

The Equal Protection Clause of the Fourteenth Amendment commands that distinctions drawn by a State--whether in the exaction of pains or in the allowance of benefits--must not be irrelevant, arbitrary or invidious. Where a State chooses to grant an advantage to one class and not

to others "[T]he attempted classification . . . must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." Gulf, Colorado and Santa Fe Ry. v. Ellis, 165 U.S. 150, 155, 159 (1897). See, e.g., Skinner v. Oklahoma, 316 U.S. 536 (1942); Baxstrom v. Herold, 383 U.S. 107 (1966).

The lesson of this Court's decisions construing the Equal Protection Clause is that there can be no difference in treatment among citizens unless there is a rational distinction between the classes affected. Or, to put it another way, where no rational distinction exists between two persons or classes, the law must treat them alike.

The lines in the present case are well-defined. There exist in Indiana two classes of persons charged with misdeeds of a serious nature. In the first class are found all citizens charged with either civil or criminal wrongdoing. Persons in this class are permitted to enter the adversary system knowing in advance the

evidence to be produced against them and possessing the ability to gather evidence on their own behalf which anticipates and refutes the allegations brought against them. However, there exists another class of persons: attorneys charged with some type of misconduct which if proven may form the basis of disbarment. The question presented is clear. Is there any rational basis for this distinction?

Unfortunately, the Indiana Supreme Court did not suggest any overriding "governmental interests" which when balanced against the appellant's interests would show this classification to be rational. All talk of speed, efficiency or judicial economy as the primary governmental interest must fail because the very same interests are present in the criminal and civil arenas. No one would sugggest that courts should not be allowed to deal sternly with a member of the bar who has violated his oath and the public trust. However, stern treatment is appropriate only after an attorney is permitted the same vigorous defense permitted others.

In Indiana and throughout the country, one of the most rapidly developing areas of the law is that of disciplinary proceedings involving attorneys. In his annual report released January 2, 1977, Chief Justice Burger called attention to the fact that many states have increased disciplinary control over the practicing attorneys.

Chief Justice Richard Givan of the Indiana Supreme Court in his State of the Judiciary address emphasized that:

> The bar is the only profession in Indiana which is subject to stringent ethics review and which supports its own policing. Disciplinary actions have made all lawyers more vigilant as to their own standards and the standards of their fellows. I agree with a recent statement of the United States Chief Justice Warren E. Burger that a lawyer who betrays his trust is more likely than ever before to be disciplined.

Chief Justice Givan further emphasized that strict policing did not begin until 1971:

> Case review prior to 1971 in Indiana was ineffective because of responsibilities divided between the bar and the Court, and because of inadequate resources for investigation and review of complaints. Now the authority rests completely within the Supreme Court and its Disciplinary Commission, and the Commission's staff allows for verification of facts and the prosecution of cases when the resulting facts recommend it.

In the most recent year Two Hundred Ninety Two (292) complaints were filed with the Indiana Disciplinary Commission.

No one would disagree that strict policing of the conduct of attorneys is necessary. However, as the professional stakes increase so must the development of the law progress. The federal question presented in this appeal is one that will no doubt be raised many times in the future. The federal question presented in this case is substantial because there is little existing law which provides any guidance.

II.

RULE 23, §14(a) DENIED APPELLANT'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY FAILING TO PERMIT ATTORNEYS CHARGED WITH MISCONDUCT THE DISCOVERY PROCEDURES NECESSARY TO INSURE FUNDAMENTAL FAIRNESS

Although the issues of equal protection and due process have been treated separately thus far, it is clear that the issue presented by this appeal lies somewhere in the conceptual overlap of these two doctrines. Thus, many of the arguments presented under the equal protection issue apply equally well under the discussion of due process. Similarly, the arguments regarding the substantial nature of the federal questions presented remain the same. Appellant will not repeat those arguments.

What constitutes due process varies greatly depending upon the governmental interest at stake along with the private interest to be affected by the governmental action. As this court noted in Cafeteria and Restaurant Workers Union, etc. v. McElroy, 367 U.S. 886 (1961),

"consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the governmental function involved as well as of the private interest that has been affected by the governmental action."

Insuring fundamental fairness has always been the policy behind due process safeguards. The framers of the Fourteenth Amendment did not anticipate the social welfare programs of the 1970's but this court in Goldberg v. Kelly, 397 U.S. 254 (1970), taught us that due process is a doctrine that insures fundamental fairness when the state seeks to terminate welfare benefits. Similar examples could be cited regarding modern consumer credit practices. See Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

What is necessary to afford due process to attorneys facing a disbarment action cannot be viewed in a vacuum. As with typical civil and criminal procedures, there is a balance struck between the interest of speedy and economical resolutions versus the interest of insuring that an adequate defense is available. In

Indiana, liberal discovery has increasingly been viewed as fundamental to the operation of the entire judicial system. In permitting discovery in criminal cases, the Indiana Supreme Court obviously felt that any increased burden placed upon prosecuting attorneys was not outweighed by the need of criminal defendants to adequately prepare their defenses. Similarly, in a disbarment action, the governmental interest of adequately policing practicing attorneys would not suffer by allowing discovery and would be outweighed by the attorney's interest in protecting his livelihood.

As noted earlier, the discipline of attorneys is a rapidly expanding area of the law. As scrutiny of attorneys increases, and as attorney misconduct is increasingly viewed as a serious violation of the public trust, so must our concept of what is necessary to insure fundamental fairness develop. Simply stated, due process requires that an attorney be given the same opportunities to answer charges of professional misconduct as enjoyed by other citizens when charged with civil or criminal wrongdoing.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

SAUL I. RUMAN

Attorney for Appellant
5261 Hohman Avenue
Hammond, Indiana 46320
(219) 933-7600

lmb
75-274-A

APPENDIX

IN THE MATTER OF JOHN JOSEPH MURRAY

THE SUPREME COURT OF INDIANA

No. 175 S21

April 26, 1977

DISCIPLINARY ACTION

SYNOPSIS: Disciplinary action against John Joseph Murray for misconduct in the practice of law. The respondent challenged the procedures used by the Hearing Officer and the sufficiency of the evidence accumulated by the Hearing Officer.

The Supreme Court of Indiana, Per Curiam, disbarred the respondent from the practice of law in Indiana. "Having found misconduct, it now becomes this Court's duty to determine the appropriate discipline in this case, taking into consideration the nature of the violation, the specific acts of the respondent, this Court's responsibility to preserve the integrity of the Bar of this State; the risk, if any, to which we will subject the public by permitting the respondent to continue in the profession or to be reinstated at some future date; and the deterrent effect the imposition of discipline has on the Bar in general."

ATTORNEYS—Disciplinary Action, Due Process. The right of procedural due process applies to proceedings involving the suspension or revocation of the license to practice law but does not include the right of pre-trial discovery in disciplinary proceedings. pp. 269, 270.

ATTORNEYS: Disciplinary Action, Complaints. It is the function of the Disciplinary Commission to review grievances, dismiss those which are baseless, and then form a complaint which places the alleged misconduct within the structure of the Code of Professional Responsibility. p. 270.

ATTORNEYS—Disciplinary Action, Review. A disciplinary proceeding is an original action in the Supreme Court and, as such, the Court sits as a trial court to determine issues of fact. p. 271.

ATTORNEYS—Disciplinary Action, Hearing Officer. The findings of a Hearing Officer appointed by the Supreme Court are reviewed and considered by the Court but are not controlling upon the Court. p. 271.

APPEARANCES: Saul I. Ruman, Hammond, Indiana, for Respondent.

David B. Hughes, Indiana Supreme Court Disciplinary Comm., for the Indiana Supreme Court Disciplinary Commission:

PER CURIAM

This is a disciplinary proceeding before this Court on an amended four-count complaint filed by the Disciplinary Commission pursuant to Admission and Discipline Rule 23, Section 12. A hearing on the complaint, filed in this cause, was conducted by a Hearing Officer appointed by this Court, and the Hearing Officer

has filed with this Court his findings of fact and conclusions of law. The respondent now petitions this Court for review of these findings and conclusions, and further petitions for oral argument. Both parties have filed briefs in this matter. This Court now denies the respondent's petition for oral argument.

In his petition for review, the respondent first asserts that he was denied due process of law by the Hearing Officer's refusal to grant several discovery motions prior to the hearing on the merits of this disciplinary proceeding. The record demonstrates that after the complaint was served on the respondent, a motion for the production of documents and interrogatories were filed under this cause. Additionally, the respondent filed his notice to take depositions of various witnesses. In response to these pleadings, the Disciplinary Commission moved to quash the deposition subpoenas. At a pre-trial conference, both parties argued the motion to quash, which the Hearing Officer eventually granted; it was the Hearing Officer's conclusion that Admission and Discipline Rule 23, as then in effect, did not authorize the discovery sought by the respondent.

At the time this matter was presented for consideration to the Hearing Officer, Admission and Discipline Rule 23, Section 14(a) provided that the rules of pleading and practice in civil cases shall not apply and disciplinary proceedings shall be heard on the complaint and answer. No provision of the rule authorized discovery.[1]

The respondent's argument appears to be the assertion of a denial of procedural due process. While the parameters of such right remain undefined, it has been generally held that the right of procedural due process, as applied to the states by the 14th Amendment of the Constitution of the United States, and as applied in this state under Article 1, Section 12, of the Constitution of Indiana, includes notice and an opportunity to be heard. *Mueller v. Mueller* (1972), 259 Ind. 366 [33 Ind.Dec. 55], 287 N.E.2d 886; *State ex rel. Red Dragon Diner v. Superior Court of Marion County, etc., et al.* (1959), 239 Ind. 384, 158 N.E.2d 164; *Neill v. Ridner* (1972), 153 Ind.App. 149 [32 Ind.Dec. 330], 286 N.E. 2d 427.

This due process standard has been applied to proceedings involving the suspension or revocation of the license to practice law, and it has been generally held that such proceedings must provide the respondent attorney with notice of the charges and an opportunity to be heard. *In re Ruffalo*, 390 U.S. 544, 20 L.Ed.

[1]Admission and Discipline Rule 23, Section 14(b) now authorizes limited discovery by the respondent and Commission.

117, 88 S.Ct. 1222, *reh. den.* 391 U.S. 961, 20 L.Ed. 874, 88 S.Ct. 1833; *In re Stivers*, (1973) 260 Ind. 120 [36 Ind.Dec. 204], 292 N.E.2d 804.

The respondent does not cite, nor is this Court aware of any authority which expands the requirements of due process to require pre-trial discovery in disciplinary proceedings. Additionally, from an examination of the record of proceedings in this matter, it appears that all witnesses subpoenaed by the respondent were available to testify at the hearing, the respondent was provided with a list of witnesses prior to the hearing, and the respondent was afforded the opportunity to cross-examine the witnesses who were called by the Disciplinary Commission. Accordingly, this Court concludes that the failure to grant discovery prior to the trial on the merits of this cause did not constitute an abridgment of the respondent's right to due process of law.

The respondent next asserts that the complaint filed in this cause enlarged upon the charges which were contained in the grievance initially submitted by the complainants. In particular, the respondent objects to that portion of the complaint alleging undue influence by a third party, arguing that the respondent has not had an opportunity to answer such charges at the administrative level of the disciplinary process.

The complaint filed by the Disciplinary Commission in all disciplinary cases is predicated on the grievance filed, but it would be absurd to hold that the grievance must be strictly construed, and the complaint must be narrowly limited to charges specified in the grievance. The vast majority of grievances are filed by persons not skilled in the law; the function of the Disciplinary Commission is to review the grievances, dismiss those which are baseless, and then frame a complaint so as to place the alleged misconduct within the structure of the Code of Professional Responsibility.

This procedure was followed by the Disciplinary Commission in this case; and, although the complainants did not specifically allege undue influence, facts were asserted in the grievance which would call the respondent's attention to the case in question. Accordingly, we find that the issue of undue influence was present at the administrative level of the disciplinary process. Also, it appears without question that the constitutional requirement of notice has been met.

Additionally, the respondent, in his petition for review, contends that he was not afforded an opportunity to question the complaining witness with leading questions, as though on cross-examination. The record in this proceeding does not support the

respondent's contention. The complaining witness was subpoenaed, but was never called as a witness by either party. This assertion of error is without merit.

The remaining portion of respondent's petition for review challenges the sufficiency of the evidence to support the findings of fact and conclusions of law reached by the Hearing Officer. The parties to this action differ as to the "standard of review" this Court should apply when examining the matters submitted by the Hearing Officer in a disciplinary proceeding. Before this Court can consider the factual issues raised, this question of the appropriate standard of review must be resolved.

It should be noted at the outset that a disciplinary proceeding is an original action in this Court. *Ind. Const.*, Art. 7, §4. As such, this Court sits as a trial court and must determine issues of fact; this clearly distinguishes the disciplinary proceeding from an appeal. *In re Pawlowski* (1959), 240 Ind. 412, 165 N.E.2d 595.

Recognizing this distinction, in the absence of any agreement by the parties as to factual issues, this Court examines and reviews all matters which have been submitted in a particular cause. An examination of the previous opinions of this Court demonstrates that the findings of fact are only the initial starting point for review by this Court. See, *In re Wood* (1976), ___ Ind. ___ [55 Ind.Dec. 630], 358 N.E.2d 128; *In re Smith* (1976), ___ Ind. ___ [53 Ind.Dec. 493], 351 N.E.2d 1; *In re Bradburn* (1966), 248 Ind. 29 [9 Ind.Dec. 606], 221 N.E.2d 885; *In re Holovachka* (1964), 245 Ind. 483 [3 Ind.Dec. 333], 198 N.E.2d 381. It is through this complete examination of all matters that this Court makes its ultimate findings of fact upon which a determination of misconduct is weighed.

The findings of the Hearing Officer thus are reviewed within this Court's consideration of all revelant matters. These findings do receive emphasis in that the Hearing Officer observes the witnesses, absorbs the nuances of unspoken communication, and by this observation attaches credibility to the testimony, but such findings are not necessarily controlling on this Court and never have been. *In re Pawlowski, supra.*

In the end, the findings of fact reached by this Court are the product of this Court's examination of the entire record with the above noted consideration being given to the findings of fact submitted by the Hearing Officer. Thus, there is no standard of review as applied within appellate procedure, but merely the application of a process of determination whereby this Court finds facts as is required in all original actions.

Under Count I of the complaint, the respondent was charged with creating a knowingly false alibi for a client, who was indicted

in a criminal proceeding, and allowing and assisting in the introduction of evidence of this false alibi during the trial of this criminal defendant.

From our examination of all matters which have been filed in this cause and after reviewing the transcript of proceedings, this Court finds that on April 16, 1971, Jerry Laine was indicted by the Starke County Grand Jury for the crime of theft by assisting one Edward Ronkowski escape from the detection and punishment for the commission of the crime of theft. Laine and Ronkowski came to the respondent and informed the respondent that Edward Ronkowski had, in fact, purchased and received stolen property and that Laine was present at the time of purchase. Edward Ronkowski paid the respondent, who, then, agreed to represent both Laine and Ronkowski in the criminal proceedings; the respondent filed an appearance for Laine and did represent him during his trial in October, 1971.

Prior to the trial of Jerry Laine, Mildred Laine, the defendant's mother, advised the respondent that Jerry Laine worked the day shift on April 1 and 2. Also, prior to the aforementioned trial, the defendant's wife, Mary Laine, met with the Respondent, Edward Ronkowski, and others in the respondent's law office, at which time she told them that she kept a private record of the dates and hours her husband worked, which showed that he had worked the day shift at Ronk's Truck Stop on April 1 and 2, 1971. The respondent, or Edward Ronkowski in the respondent's presence, instructed Mary Laine to discard and forget about her records, as they were going to use other time sheets at the trial in support of Jerry Laine's fabricated alibi that he was not working at Ronk's Truck Stop when Edward Ronkowski purchased the stolen property. Additionally, the respondent took the depositions of Robert Spenner and Timothy Ambers, who had already been convicted, sentenced and incarcerated at the Indiana Youth Center for the burglary wherein they had stolen the property which they thereafter sold to Edward Ronkowski at Ronk's Truck Stop on April 2, 1971. Both testified under oath in said depositions that Jerry Laine was working during the daytime at Ronk's Truck Stop on April 2, 1971, and was present when they sold the stolen property to Edward Ronkowski.

The respondent had a conference with Laine and Ronkowski in his law office before Laine's trial and was shown time sheets for Ronk's Truck Stop which demonstrated that Jerry Laine worked the day shift on April 2, 1971; at this time, the respondent advised Laine and Ronkowski that these work records would have to be changed. Jerry Laine returned to the Truck Stop and prepared a set of false time sheets evincing that he worked the night rather than the day shift.

At a pre-trial conference in the respondent's law office, at which Edward Ronkowski was present, the respondent asked Mildred Laine, the defendant's mother, to falsely testify in support of the fabricated alibi that Jerry Laine had worked the midnight to 8:00 a.m. shift at Ronk's Truck Stop on April 2, 1971, and then he went directly to her house afterwards to paint the kitchen.

Additionally, prior to Jerry Laine's trial, the respondent filed a notice of alibi, asserting that the defendant was at the home of his mother from 8:30 a.m. to approximately 4:00 p.m. on April 1 and 2, 1971.

At the trial of Jerry Laine, Cause No. 5512, in the Starke County Circuit Court, held on October 26 and 27, 1971, the respondent knowingly, by his questions, guided Jerry Laine, Edward Ronkowski, Mildred Laine, Ellen (Budka) Moorman and Ronald Gaze through their false testimony in support of the fabricated alibi that Jerry Laine was not present at Ronk's Truck Stop on April 2, 1971, at the time Edward Ronkowski purchased the stolen property, thereby perjuring themselves. The respondent elicited testimony at the trial concerning the fabricated work records of Ronk's Truck Stop for April 2, 1971, from Edward Ronkowski in an attempt to corroborate his testimony, knowing of the falsity of such records, and the respondent knowingly elicited perjured testimony at this trial and never made any attempt to reveal the fraud perpetrated upon the Starke County Circuit Court to any affected person or tribunal, or to rectify the fraud.

After the conclusion of this trial, Ellen Moorman was indicted and found guilty of perjury by reason of testimony in the Laine trial, and Ron Gaze plead guilty to perjury at the Laine trial.

In light of our above findings of fact under Count I of the amended complaint filed in this cause, we now conclude that the respondent violated Disciplinary Rules 7-102(A) (2), (3), (4), (5), (6), (7), and (8); 7-102 (B)(1) and (2), and 7-109(A) of the Code of Professional Responsibility for Attorneys at Law.

Under Count II of the amended complaint, the respondent is generally charged with allowing Edward Ronkowski, who paid the respondent to defend Laine, to direct or regulate the respondent's professional judgment in rendering legal services to Laine.

In addition to the findings made under Count I of the amended complaint, which are incorporated in our findings under this Count, we now further find that after Ronkowski and Laine were indicted by the Starke County Grand Jury for theft, both defendants came to the respondent's office and sought

representation. Due to Laine's lack of financial means, Edward Ronkowski employed the respondent to represent Laine as well as himself; the respondent entered an appearance on behalf of Jerry Laine and represented Laine during the course of his trial. Edward Ronkowski was present at respondent's pre-trial conferences and interviews with various witnesses concerning the Laine case, which included conferences in the respondent's law office with Jerry Laine, Mildred Laine, and Mary Laine. With the respondent's knowledge, Edward Ronkowski and Jerry Laine created new and false time sheets, which, if true, would have amounted to an alibi for Laine. At a pre-trial conference in the respondent's office, the respondent or Edward Ronkowski, in the presence of the respondent, instructed Mary Laine to discard and forget about her records, as they were going to use other time sheets at the trial in support of Jerry Laine's fabricated alibi that he was not working at Ronk's Truck Stop when Edward Ronkowski purchased the stolen property from Robert Spenner and Timothy Ambers on April 2, 1971. Although Edward Ronkowski actively participated in the questioning of witnesses for the Laine trial and made suggestions with regard to trial testimony, the respondent made no effort to prevent or rectify such interference.

In light of our above findings under Count II of the amended complaint, we now conclude that the respondent violated Disciplinary Rule 5-107(B) of the Code of Professional Responsibility for Attorneys at Law.

Under Count III of the complaint, the respondent is charged with suppressing evidence, allowing a witness to be compensated in exchange for favored testimony, assisting a client in unlawful or fraudulent conduct, advancing an unwarranted defense, failing to disclose illegal activity, allowing his professional judgment to be regulated by a third party, and engaging in conduct which is prejudicial to the administration of justice and adversely reflects on his fitness to practice law.

After carefully considering all matters which have been submitted in this cause, and after carefully reviewing the record of proceedings, we now find that the respondent made four visits to the Indiana Youth Center in Plainfield on or about October 24, 1971, October 31, 1971, November 7, 1971, and November 14, 1971, to interview Robert Spenner and Timothy Ambers, who had been convicted, sentenced and incarcerated at the Indiana Youth Center for the burglary of Dolezal's Shopping Center in San Pierre, Indiana, on April 1, 1971, from which they obtained the stolen property they sold to Edward Ronkowski at Ronk's Truck Stop on April 2, 1971.

Robert Spenner and Timothy Ambers were essential State's witnesses in the criminal prosecutions of *State of Indiana v. Jerry*

Laine, Cause No. 5512, and *State of Indiana v. Edward Ronkowski*, Cause No. 5513, both in the 1971 term of the Starke County Circuit Court. The respondent was the attorney of record for the defendants in both of the aforementioned criminal prosecutions during the times he made the four (4) visits to the Indiana Youth Center. The respondent was not, nor ever was, an attorney for Robert Spenner and Timothy Ambers.

The respondent had already taken the depositions of Robert Spenner and Timothy Ambers concerning the above-mentioned criminal prosecutions against Jerry Laine and Edward Ronkowski on October 6, 1971, prior to the respondent's four (4) visits to the Indiana Youth Center. Both deponents had answered all questions freely and testified under oath that Jerry Laine was working during the daytime at Ronk's Truck Stop on April 2, 1971, and was present when they sold the stolen property to Edward Ronkowski. Neither Robert Spenner nor Timothy Ambers attempted to avoid being deposed on right against self-incrimination grounds.

The respondent's October 24, 1971, visit to the Indiana Youth Center was prior to the Laine trial, and all four (4) of the respondent's visits to the Indiana Youth Center were prior to the aforementioned Ronkowski trial. At the respondent's first interview with Robert Spenner and Timothy Ambers at the Indiana Youth Center on October 24, 1971, the respondent indicated to these potential witnesses that they could avoid testifying at the then forthcoming Laine and Ronkowski trials by asserting their rights under the Fifth Amendment. The respondent did not inform them that because of (a) their guilty plea to and conviction for second degree burglary, (b) their testimony given to the grand jury which indicted Laine and Ronkowski, and (c) their testimony freely given at their October 6, 1971, depositions, they probably had no privilege not to testify against Laine or Ronkowski, or that if the State conferred immunity upon them they would be compelled to testify.

The respondent, by his words and conduct at the trial of Jerry Laine on October 27, 1971, encouraged State's witnesses Robert Spenner and Timothy Ambers not to testify against Laine on right against self-incrimination grounds even after they had been granted immunity pursuant to law. Timothy Ambers did, in fact, refuse to testify at the Laine trial on October 27, 1971, on right against self-incrimination grounds, for which he was found in contempt of court and was given a six (6) month sentence. Robert Spenner also attempted to avoid testifying at the Laine trial on October 27, 1971, on right against self-incrimination grounds, but did testify with reluctance after being informed that he could not avail himself of such a right.

The respondent was accompanied at his third interview with Robert Spenner and Timothy Ambers at the Indiana Youth Center on November 7, 1971, by Edward Ronkowski. The respondent advised and encouraged Edward Ronkowski to offer money to Robert Spenner and Timothy Ambers at their November 7, 1971, visit with them at the Indiana Youth Center, and to thereafter give money to the wife of one of the incarcerated youths. Edward Ronkowski did offer State's witnesses Robert Spenner and Timothy Ambers money during the respondent's and his visit with them at the Indiana Youth Center on November 7, 1971; and sometime after Edward Ronkowski's offer of money to Robert Spenner and Timothy Ambers on November 7, 1971, Robert Spenner's wife received a plain white envelope containing one hundred dollars, which she sent to Robert Spenner and Timothy Ambers at the Indiana Youth Center.

Considering all the evidence which has been presented, we can only infer that the respondent's efforts at having Spenner and Ambers stubbornly assert their right to remain silent in the face of contempt and after immunity had been granted, was an attempt on the respondent's part to improperly suppress evidence. Furthermore, the offer of money to these potentially adverse witnesses was an apparent effort to purchase favored testimony.

In light of our above findings under Count III of the amended complaint, we now conclude that the respondent violated Disciplinary Rules 1-102(A) (5) and (6); 7-102(A), (2), (3), (7), and (8); and 7-109(A) and (C) of the Code of Professional Responsibility for Attorneys at Law.

Under Count IV of the complaint, the respondent is charged with violating a disciplinary rule; engaging in illegal conduct involving moral turpitude; engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; engaging in conduct that is prejudicial to the administration of justice; engaging in conduct that adversely reflects on his fitness to practice law; failing to disclose that which he is required by law to reveal; knowingly using perjured testimony or false evidence; making a false statement of law or fact; participating in the creation or preservation of evidence when he knew, or it was obvious the evidence was false; counselling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent, and knowingly engaging in other illegal conduct or conduct contrary to a Disciplinary Rule.

After considering all matters which have been submitted in this cause and after reviewing the record of proceedings, we now find that on or about February 25, 1972, a house owned by Orville

Nichols, the Deputy Prosecutor of Starke County, Indiana, was extensively damaged by fire.

On March 13, 1972, Charles Romenzak signed an Affidavit for Probable Cause for the Prosecuting Attorney of Starke County, Indiana, in connection with the February 25, 1972, burning of the Nichols' house, the substance of which was that:

Stanley Romenzak, the affiant's brother, talked to the affiant about burning the Nichols' house approximately three (3) weeks prior to the February 25, 1972, burning of it. Stanley Romenzak told the affiant that Edward Ronkowski had offered to pay five hundred dollars ($500.00) for the burning of the Nichols' house. On February 25, 1972, after the Nichols' house had been burned, Stanley Romenzak and Donnie Barnett told the affiant that they had set fire by igniting a gasoline mixture. On March 13, 1972, Carol Romenzak signed an Affidavit for Probable Cause for the Prosecuting Attorney of Starke County, Indiana, in connection with the February 25, 1972, burning of the Nichols' house, the substance of which was that: On February 24, 1972, the affiant was in an automobile with Stanley Romenzak, the affiant's brother, and Donnie Barnett, when Stanley Romenzak told the affiant that he and Donnie Barnett were going to burn a house belonging to Nichols. Stanley Romenzak told the affiant that Edward Ronkowski would pay them five hundred dollars ($500.00) for burning the Nichols' house. On February 24, 1972, the affiant, Stanley Romenzak, and Donnie Barnett drove to Ronk's Truck Stop, and upon arriving at it Stanley Romenzak and Donnie Barnett got out of the automobile and talked with Jerry Laine. Upon getting back into the automobile, they told the affiant that they would burn the Nichols' house later that night. On February 25, 1972, the affiant rode past the burned Nichols' house in an automobile with Stanley Romenzak and Donnie Barnett, both of whom told the affiant they had burned it. On March 20, 1972, Rosalind (Shively) Romenzak signed an Affidavit for Probable Cause for the Prosecuting Attorney of Starke County, Indiana, in connection with the February 25, 1972, burning of the Nichols' house, the substance of which was that: On or about March 2, 1972, the affiant drove to Bloomington, Illinois, with Stanley Romenzak, who told the affiant that he and Donnie Barnett had burned the home of a lawyer in Knox, Indiana, approximately a week before. Stanley Romenzak told the affiant that Edward Ronkowski had asked him to burn the Nichols' house and would pay Stanley Romenzak for doing so.

As a result of the Affidavits for Probable Cause signed by Charles Romenzak, Carol Romenzak and Rosalind (Shively) Romenzak, Stanley Romenzak and Donnie Barnett were charged

with Arson in the First Degree, Cause No. 5637 and Cause No. 5636 respectively, in the 1972 term of the Starke Circuit Court, on March 21, 1972, which charged in substance that on February 25, 1972, Stanley Romenzak and Donnie Barnett feloniously, willfully and maliciously burned and destroyed a house owned by Orville Nichols. After Stanley Romenzak had been charged with Arson in the aforementioned cause, Jerry Laine went to the respondent's law office and requested the respondent to represent Stanley Romenzak in the said cause. Jerry Laine gave the respondent two hundred dollars ($200), for which the respondent agreed to represent Stanley Romenzak through the arraignment stage.

Edward Ronkowski was still a client of the respondent in March or April, 1972, when he accepted the representation of Stanley Romenzak in the above-mentioned cause. All three of the Affidavits for Probable Cause signed by Charles Romenzak, Carol Romenzak and Rosalind (Shively) Romenzak implicated Edward Ronkowski as the principal behind the February 25, 1972, arson committed on the Nichols' house. The Affidavit for Probable Cause signed by Carol Romenzak also implicated Jerry Laine as being involved in the arson.

On or about April 9 or 10, 1972, the respondent told Jerry Laine that he wanted Jerry Laine to bring Charles Romenzak, Carol Romenzak and Rosalind (Shively) Romenzak to his law office for the purpose of discussing with them the affidavits they had made for the Prosecuting Attorney of Starke County in March, 1972, concerning the February 25, 1972, burning of the Nichols' house. On April 10, 1972, Jerry Laine did bring Charles Romenzak, Carol Romenzak and Rosalind (Shively) Romenzak to the respondent's law office. During this April 10, 1972, conference in the respondent's law office, the respondent told Charles Romenzak, Carol Romenzak and Rosalind (Shively) Romenzak that they had to change their March, 1972, affidavits in order to help Stanley Romenzak in his above-mentioned cause. Jerry Laine was in the respondent's law office on April 10, 1972, when the respondent told Charles Romenzak, Carol Romenzak and Rosalind (Shively) Romenzak that they had to change their original March, 1972, affidavits. The respondent knew that the March 13, 1972, affidavit of Carol Romenzak stated that Jerry Laine had made threats of physical violence against Carol Romenzak. Therefore, the respondent knew, or should have known, that one or more of the above-named affiants could have been intimidated by the presence of Jerry Laine in the respondent's law office on April 10, 1972.

The respondent drew up counter-affidavits for Charles Romenzak, Carol Romenzak and Rosalind (Shively) Romenzak in their presence on April 10, 1972, without consulting or ques-

tioning them as to the substance or content of the counter-affidavits. The April 10, 1972, counter-affidavits drawn up by the respondent were basically of the same form as the original March, 1972, affidavits of Charles Romenzak, Carol Romenzak and Rosalind (Shively) Romenzak, except that the respondent interlineated the negative into every material affirmative statement of each affidavit. Therefore, the April 10, 1972, counter-affidavits were wholly contradictory to the original March, 1972, affidavits in all material respects, other than biographical information pertaining to the individual affiants. At no time did the respondent ask Charles Romenzak, Carol Romenzak or Rosalind (Shively) Romenzak whether their original March, 1972, affidavits were true or not, nor did any of these affiants tell the respondent or anyone else that their March, 1972, affidavits were false.

At their meeting with the respondent in his law office on April 10, 1972, at least one of the above-named affiants asked the respondent whether they could get in any trouble for signing two contradictory affidavits. The respondent told them, in essence, that they would not get into any trouble, knowing that their signing of the counter-affidavits would necessarily mean that Charles Romenzak, Carol Romenzak and Rosalind (Shively) Romenzak had perjured themselves on either the March, 1972, or April 10, 1972, affidavits. In Jerry Laine's presence, Charles Romenzak, Carol Romenzak and Rosalind (Shively) Romenzak signed the counter-affidavits drawn up by the respondent. This occurred in the reception area of the respondent's law office, on April 10, 1972. In addition to helping Stanley Romenzak in Cause No. 5637, 1972 term of the Starke County Circuit Court, the respondent in obtaining the April 10, 1972, counter-affidavits from Charles Romenzak, Carol Romenzak and Rosalind (Shively) Romenzak was also obtaining exculpatory evidence for use in possible future criminal prosecutions against Jerry Laine and Edward Ronkowski in connection with the February 25, 1972, arson committed on the house of Orville Nichols.

In light of our findings under Count IV of the amended complaint, we now conclude that the respondent violated Disciplinary Rules 1-102(A) (1), (3), (4), (5) and (6); and 7-102(A) (4), (5), (6), (7) and (8) of the Code of Professional Responsibility for Attorneys at Law.

In his petition for review, the respondent has challenged the findings of fact of the Hearing Officer, which findings, in large measure, correspond to the findings of this Court. The basis of this challenge is that many findings are only sustained through the testimony of Jerry Laine, a convicted perjurer who was

dissatisfied with the legal representation of the respondent, and who, again, may be fabricating a story as a vehicle of revenge directed toward the respondent. The respondent further points out that there are certain inconsistencies in the testimony of the witnesses for the Commission, and states that the only logical and coherent explanation of the facts can be found in the testimony of the respondent who unequivocally denied any misconduct.

In reaching our findings, this Court considered all evidence which was submitted and reviewed all of the testimony. Our findings are the product of our analysis of these considerations and the findings submitted by the Hearing Officer. We further note that Jerry Laine testified that he had five and one-half years of formal education; he cannot read or write. After examining Mr. Laine's testimony, we find it extremely difficult to attach the Machiavellian design respondent suggests in his petition for review. Accordingly, these assertions of error directed toward the findings are now denied.

Having found misconduct, it now becomes this Court's duty to determine the appropriate discipline in this case, taking into consideration the nature of the violation, the specific acts of the respondent, this Court's responsibility to preserve the integrity of the Bar of this State; the risk, if any, to which we will subject the public by permitting the respondent to continue in the profession or to be reinstated at some future date; and the deterrent effect the imposition of discipline has on the Bar in general. *In re Woods, Supra; In re Noel* (1976) ___ Ind. ___ [53 Ind.Dec. 625], 350 N.E.2d 623; *In re Lee* (1974), 262 Ind. 439 [44 Ind.Dec. 226], 317 N.E.2d 444.

Under the above findings of this Court, we have found twenty-nine different violations of the Code of Professional Responsibility. This misconduct includes using perjured testimony, making false statements of fact and law, participating in the creation of false evidence, failing to reveal to the trial tribunal the existence of fraud perpetrated by clients and witnesses, allowing third persons to direct and regulate professional judgment, engaging in conduct prejudicial to the administration of justice, and acquiescing in the payment of witnesses for favored testimony.

It appears to this Court that the respondent has little regard for the requirements of the Code of Professional Responsibility. While an attorney always must be zealous in his representation of individuals, there are limits and the provisions of the Code of Professional Responsibility have been drafted to set forth these limits. The respondent in this case is not a young practitioner, who has inadvertently exceeded the area of permissible conduct;

the respondent is an experienced attorney, and his flagrant disregard for provisions of the Code is unjustified, unreasoned, and unmitigated.

With the foregoing considerations in mind, we now conclude that in order to preserve the integrity of the legal profession, and in order to protect the public in general from future conduct as demonstrated in this case, this Court must impose the maximum disciplinary sanction authorized by the Constitution of the State of Indiana. Accordingly, by reason of the misconduct found under Counts, I, II, III, and IV of the amended complaint, it is now ordered that the respondent be and he hereby is disbarred as an attorney in the State of Indiana.

Costs of these proceedings are assessed against the respondent.

IN THE

SUPREME COURT OF INDIANA

IN THE MATTER OF	)	
	)	CAUSE NO. 175 S 21
JOHN JOSEPH MURRAY	)	

Respondent's "Petiton for Rehearing" is hereby DENIED. Givan, C.J. DeBruler, Hunter, Prentice, JJ., Concur. Pivarnik, J., not participating.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and seal of said Court, this 19th day of July, 1977.

/s/ Billie R. McCullough
Clerk Supreme Court and
Court of Appeals

IN THE

SUPREME COURT OF INDIANA

IN THE MATTER OF	)	
	)	CAUSE NO. 175 S 21
JOHN JOSEPH MURRAY	)	

NOTICE OF APPEAL TO THE
UNITED STATES SUPREME COURT

Notice is hereby given that John Joseph Murray, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment and order of July 19, 1977 which denied rehearing in the above-captioned cause wherein John Joseph Murray was disbarred from the practice of law in the State of Indiana.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

SAUL I. RUMAN

/s/ Saul I. Ruman

Attorney for Appellant
5261 Hohman Avenue
Hammond, Indiana 46320
(219) 933-7600

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-574

IN THE MATTER OF
JOHN JOSEPH MURRAY

Appellant

ON APPEAL FROM THE
SUPREME COURT OF INDIANA

MOTION TO DISMISS OR AFFIRM

SHELDON A. BRESKOW
DAVID B. HUGHES
814 ISTA Building
Indianapolis,
Indiana 46204
(317) 633-4454

Attorneys for Appellee

Indiana Supreme Court
Disciplinary Commission

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.	ii
I. THE "STATE STATUTE" INVOLVED AND THE NATURE OF THE CASE. . .	1
A. The "Statute"	1
B. The Proceedings Below . . .	7
II. ARGUMENT.	8
THE QUESTIONS ARE SO UNSUBSTANTIAL AS TO NOT NEED FURTHER ARGUMENT.	8
A. Equal Protection.	8
B. Due Process	11
III. CONCLUSION.	14

TABLE OF AUTHORITIES

Cases

	Page
Alabama State Federation of Labor v. McAdory (1945), 325 U.S.450, 49 L.Ed.1725, 65 S.Ct. 1384.	11
Cohen v. Hurley (1961), 366 U.S. 117, 6 L.Ed.2d 156, 81 S.Ct.954.	9
Dohaney v. Rogers (1930), 281 U.S. 362, 74 L.Ed.904, 50 S.Ct.299. .	9, 12
In Re Murray (1977), ___Ind.___, 362 N.E.2d 128	4, 8
In Re Ruffalo (1968), 390 U.S.544, 88 S.Ct. 1222, 20 L.Ed.2d 117. .	12
Schware v. Board of Bar Examiners of New Mexico (1957), 353 U.S. 232, 77 S.Ct.752, 1 L.Ed2d 796 .	12
Tinsley v. Anderson (1898), 171 U.S.101, 43 L.Ed. 91, 81 S.Ct. 805	9
United States v. King (D.C. Fla., 1973), 368 F.Supp. 130.	13

Other Authorities

Code of Professional Responsibility for Attorneys at Law (Ind. R. A.D. 23, Sections 11 and 12). . . 2

Disbarment in the United States: Who Shall Do The Noisome Work? 12 Columbia Journal of Law and Social Problems 1, at pp.17-30 (1975). 13

Indiana Rules for Admission to the Bar and the Discipline of Attorneys:

Ind. R. A.D. 23, Section 13 . . . 2

Ind. R. A.D. 23, Section 14 . . . 4, 6, 7, 8, 10, 11

Ind. R. A.D. 23, Section 15 . . . 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-574

IN THE MATTER OF
JOHN JOSEPH MURRAY

Appellant

ON APPEAL FROM THE
SUPREME COURT OF INDIANA

MOTION TO DISMISS OR AFFIRM

SHELDON A. BRESKOW
DAVID B. HUGHES
814 ISTA Building
Indianapolis, Indiana 46204
317-633-4454

Attorneys for Appellee,
Indiana Supreme Court
Disciplinary Commission

MOTION TO DISMISS OR AFFIRM

The Appellee, Indiana Supreme Court Disciplinary Commission, moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Indiana, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as to not need further argument.

I.

THE "STATE STATUTE" INVOLVED AND THE NATURE OF THE CASE

A. The "Statute"

This appeal seeks to question the federal constitutionality of a certain provision formerly among the Rules of the Supreme Court of Indiana regarding the admission and discipline of attorneys at law (Rules for Admission to the Bar and the Discipline of Attorneys, Burns Indiana Statutes Annotated, Code Edition, Court Rules, Book 2).

Indiana Admission and Discipline Rule 23 is the Rule which governs the procedure for instituting, hearing and determining charges of substantial professional misconduct against members of the Indiana Bar. The Appellee, Indiana Supreme Court Disciplinary Commission, is charged with the responsibility of filing a verified complaint against an attorney when the Appellee has determined from an investigation that reasonable cause exists to believe such attorney is guilty of professional misconduct in violation of the Code of Professional Responsibility for Attorneys at Law. (Ind. R. A.D. 23, Sections 11 and 12). The complaint of misconduct then is referred to a Hearing Officer to conduct a hearing and to make his written findings of fact and recommendation to the Supreme Court of Indiana (Ind. R. A.D. 23, Section 13). The Supreme Court of Indiana reviews the proceeding de novo

and enters judgment or such other order as is appropriate in the premises. (Ind. R. A.D. 23, Section 15). The standard of review of the Supreme Court of Indiana in such cases was most recently articulated in this very proceeding, as follows:

> "It should be noted at the outset that a disciplinary proceeding is an original action in this Court. Ind. Const., Art. 7, §4. As such, this Court sits as a trial court and must determine issues of fact; this clearly distinguishes the disciplinary proceeding from an appeal. In Re Pawlowski (1959), 240 Ind. 412, 165 N.E.2d 595.
>
> "Recognizing this distinction, in the absence of any agreement by the parties as to factual issues, this Court examines and reviews all matters which have been submitted in a particular cause. An examination of the previous opinions of this Court demonstrates that the findings of fact are only the initial starting point for review by this Court (citing cases). It is through this complete examination of all matters that this Court makes its ultimate findings of fact upon which a determination of misconduct is weighed.

> "The findings of the Hearing Officer thus are reviewed within this Court's consideration of all relevant matters. These findings do receive emphasis in that the Hearing Officer observes the witnesses, absorbs the nuances of unspoken communication, and by this observation attaches credibility to the testimony, but such findings are not necessarily controlling on this Court and never have been.
>
> "In the end, the finding of fact reached by this Court are the product of this Court's examination of the entire record with the above noted consideration being given to the findings of fact submitted by the Hearing Officer. Thus, there is no standard of review as applied within appellate procedure, but merely the application of a process of determination whereby this Court finds facts as is required in all original actions."
>
> In Re Murray (1977), ____Ind.____, 362 N.E.2d 128.

As originally adopted in 1970, effective June 23, 1971, Ind. R. A.D. 23, Section 14, provided in pertinent part the following respecting the procedure governing disciplinary cases subsequent to the filing of the misconduct complaint during the Hearing Officer stage:

"Section 14, Proceedings before the hearing officers.

"(a) The rules of pleading and practice in civil cases shall not apply. No dilatory motions shall be entertained. The case shall be heard on the complaint and an answer which may be filed by the respondent within thirty (30) days after notice of the filing of the complaint. An answer, if filed, may assert any legal defense. If the respondent shall elect to file an answer, he shall file six (6) copies with this court. An answer need not be filed, in which case the complaint shall be taken as denied. A respondent may on a showing of good cause petition for a change of hearing officer within ten (10) days after the appointment of such hearing officer.

"(b) The complainant and the respondent shall be given not less than fifteen (15) days written notice of the hearing date. The respondent shall have the right to attend the hearing in person, to be represented by counsel, to cross-examine the witnesses testifying against him and to produce and require the production of evidence and witnesses in his own behalf, as in civil proceedings.

"(c) The proceedings may be summary in form and shall be without the intervention of a jury and shall be reported.

"(d) Within thirty (30) days after the conclusion of the hearing, the hearing officers shall determine whether

misconduct has been proven by a preponderance of the evidence and shall submit to the Supreme Court written findings of fact and recommendations concerning disposition of the case. A copy of said findings and recommendations shall be served by the hearing officer on the respondent and the executive secretary of the disciplinary commission, at the time of filing same with the Supreme Court...."

The above provision was amended November 24, 1975, effective January 31, 1976, to provide among other things for various methods of pre-hearing discovery upon a showing of good cause. The amended provision was not applicable to the instant proceeding because the formal hearing in this matter was held in July, 1975.

Appellant contends that Ind. R. A.D. 23, Section 14, as in effect in 1975, which was construed in this case not to require pre-hearing discovery by way of motions to produce, interrogatories and oral depositions, violates the Due Process and Equal Protection clauses of the Fourteenth Amendment.

B. The Proceedings Below

The Appellant was charged by the Appellee with several counts of professional misconduct. After a Hearing Officer was appointed, the Appellant filed a motion for the production of documents by the Appellee and he also propounded interrogatories to Appellee. Additionally, Appellant filed notices regarding proposed pre-hearing depositions upon oral examination of various possible witnesses. The Appellee opposed discovery by way of motions to produce, interrogatories and depositions and the Hearing Officer concluded that such modes of discovery were not authorized by Ind. R. A.D. 23, Section 14.

The proceeding was eventually heard by the Hearing Officer and fully reviewed by the Supreme Court of Indiana. Appellant was permanently disbarred for gross professional misconduct. The Supreme Court of Indiana concluded, among other things, that the Appellant's inability to obtain pre-hearing discovery by

way of motions to produce, interrogatories and oral depositions did not constitute an abridgement of the Appellant's right to due process of law. In Re Murray, supra.

II.

ARGUMENT

THE QUESTIONS ARE SO UNSUBSTANTIAL AS TO NOT NEED FURTHER ARGUMENT

A. Equal Protection

Appellant urges that former Ind. R. A.D. 23, Section 14, violates the Equal Protection guarantee of the Fourteenth Amendment in that it fails to afford lawyers in disbarment proceedings the same pre-trial discovery methods available in Indiana generally to civil litigants and criminal defendants.

Appellant contends that this federal question is substantial "because there is little existing law which provides any guidance" (Appellant's Brief, p. 20). He cites no "existing law" on the point. It is the general rule that equal protection of the laws is not denied

by a course of procedure applied to legal proceedings in which a particular person is affected if the same procedure would be applied to all others similarly situated. Tinsley v. Anderson (1898), 171 U.S. 101, 43 L.Ed. 91, 81 S.Ct. 805. Different types of judicial proceedings may be classified and different types of procedure provided for each so long as the classification is reasonable. Dohaney v. Rogers (1930), 281 U.S. 362, 74 L.Ed. 904, 50 S.Ct. 299. A state constitutionally can afford a different procedure in attorney disbarment proceedings than is afforded in, for example, criminal proceedings. Cohen v. Hurley (1961), 366 U.S. 117, 6 L.Ed.2d 156, 81 S.Ct. 954. The interest of a state in the integrity and competency of its bar is so great that it

> "***could rationally conclude that the profession itself need not be subjected to the disrespect which would result from the publicity, delay and possible ineffectiveness...

> that might follow could miscreants only be dealt with through ordinary investigative and prosecutorial processes." Cohen v. Hurley, supra, 366 U.S. at 127.

The Appellant does not contend that he was treated differently from other attorneys similarly situated.

Appellant does not attempt to demonstrate how he suffered any injury in his disbarment proceeding by being unable to pursue carte blanche discovery. He does not contend that he was unable to defend himself adequately against the disbarment charges; that he was surprised by or otherwise unable effectively to meet the testimony of his accusers; that any testimony was lost to him by the unavailability of any witness; or that any prospective witness refused to give him a statement prior to hearing. In short, he has failed to contend or demonstrate how he was affected injuriously by former Ind. R. A.D. 23, Section 14. Such

failure is fatal to his argument that the Rule is unconstitutional. Alabama State Federation of Labor v. McAdory (1945), 325 U.S. 450, 89 L.Ed. 1725, 65 S.Ct. 1384.

B. Due Process

Appellant contends that former Ind. R. A.D. 23, Section 14, violated his right to Due Process of law by failing to provide for pre-hearing discovery.

Appellant has cited no authority for the proposition that Due Process clause of the Fourteenth Amendment guarantees pre-hearing discovery as is now the general custom in civil cases. The Commission is unaware of any such authority. Appellant misconstrues the scope of the Due Process guarantee.

> "The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding

> and the character of the rights which may be affected by it." Dohany v. Rogers, supra, 281 U.S. at 362.

A fair hearing has never been said to turn upon the availability of pre-hearing discovery as by motions to produce, interrogatories or depositions. Indeed, Appellant does not contend that lack of pre-hearing discovery in fact deprived him of a fair hearing and he does not attempt to show in what manner he was injuriously affected by not being able to pursue carte blanche discovery.

It is, of course, true that a State cannot exclude a person from the practice of law or from any occupation in a manner that contravenes the Due Process clause of the Fourteenth Amendment. Schware v. Board of Bar Examiners of New Mexico (1957), 353 U.S. 232, 77 S.Ct.752, 1 L.Ed.2d 796. In a disbarment proceeding, the respondent is entitled to fair notice as to the reach of the grievance and a fair opportunity to be heard. In Re Ruffalo (1968), 390 U.S.544,

88 S.Ct. 1222, 20 L.Ed.2d 117. See also Article, Disbarment in the United States: Who Shall Do The Noisome Work?, 12 Columbia Journal of Law and Social Problems 1, at pp. 17-30 (1975). But no case or commentator has ever held or suggested that pre-hearing discovery as in civil cases is a guarantee of Due Process.

The only authority found by Appellee that discusses an issue remotely akin to the present one is United States v. King (D.C. Fla., 1973), 368 F.Supp.130. In King, a criminal defendant contended that he was denied Due Process by the refusal of the Government's witnesses to submit to pre-trial interviews. The District Judge rejected this contention and held that the additional burden of preparing for trial caused by the lack of cooperation of the witnesses did not constitute a deprivation of Due Process.

III.

CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as to not need further argument and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of Indiana.

Respectfully submitted,

Sheldon A. Breskow

David B. Hughes

Attorneys for Appellee
814 ISTA Building
Indianapolis, Indiana 46204
317-633-4454